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IN THE

Supreme Court of the United States

DAVID SHOPE, HANK KLUMPP, CHARLES SHOOP, ROBERT BEST, RUTH BEST, ANDREW DRYSDALE, LOIS DRYSDALE, JERRY W. KERN, and SANDRA KERN,

Petitioners,

v.

STATE OF NEW JERSEY, NEW JERSEY DEPARTMENT OF ENVIRONMENTAL PROTECTION, NEW JERSEY HIGHLANDS WATER PROTECTION AND PLANNING COUNCIL, and NEW JERSEY WATER SUPPLY AUTHORITY,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a State Statute which only promotes the public purpose of preserving undeveloped land in its natural state and which directly results in a seventy-five percent (75%) depreciation in property value, with an aggregate equity loss of $15 billion dollars, result in an unconstitutional taking of property without compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution?

2. Whether the right to farm should be recognized as a fundamental right, and therefore any legislation regulating farming should be subject to a higher standard of scrutiny?

PARTIES TO THE PROCEEDING

The parties below are listed in the caption with the exception of the County of Warren, which did not participate in the appeal since as a political subdivision, it could not assert U.S. Constitutional violations against the State of New Jersey.

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PETITION FOR WRIT OF CERTIORARI

David Shope, Hank Klumpp, Charles Shoop, Robert Best, Ruth Best, Andrew Drysdale, Lois Drysdale, Jerry W. Kern, and Sandra Kern respectfully petition for a Writ of Certiorari, to review the judgment of the Appellate Division of New Jersey, which was denied certification by the Supreme Court of the State of New Jersey.

OPINIONS BELOW

The opinion of the New Jersey Appellate Division was decided on September 4, 2009 and is reported in *County of Warren, et al. v. State of New Jersey, et al.*, 409 N.J.Super. 495 (App.Div. 2009), 978 A.2d 312; it appears at Appendix A to the petition. Petitioner's Appendix (Pet. App.) 1a – 27a. The opinions and rulings of the trial court (New Jersey Superior Court, Law Division, Mercer County) were not published. The May 15, 2008 Order denying plaintiffs motion for reconsideration appears at Appendix B. Pet. App. 28a – 30a. The April 11, 2008 opinion of the trial court denying plaintiffs motion for reconsideration appears at Appendix C. Pet. App. 31a – 34a. The January 18, 2008 Order of the Superior Court of New Jersey, Law Division, Mercer County dismissing the complaint appears at Appendix D. Pet. App. 35a – 36a. The January 18, 2008 opinion of the trial court granting the motion to dismiss the complaint appears at Appendix E. Pet. App. 37a – 45a. The Order of the Supreme Court of New Jersey denying the petition for certification dated January 12, 2010 and filed January 14, 2010 appears at Appendix F. at Pet. App. 46a – 47a.

STATEMENT OF JURISDICTION

The Order denying certification by the New Jersey Supreme Court was signed January 12, 2009 and filed on January 14, 2009. The opinion of the New Jersey Superior Court, Appellate Division, was decided September 4, 2009. The Order of the New Jersey Superior Court, Law Division, denying the plaintiffs' motion for reconsideration was filed May 15, 2008. The Order of the New Jersey Superior Court, Law Division, dismissing plaintiffs' complaint was filed January 18, 2008. This Court has jurisdiction under 28 U.S.C. § 1257(a) to review the final decision by the New Jersey Courts of United States Constitutional issues.

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment of the United States Constitution provides in pertinent part: "nor shall private property be taken for public use, without just compensation." U.S. Const. Amend. 8.

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part: "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the Equal Protection of the laws." U.S. Const. Amend XIV, §1.

STATEMENT OF THE CASE

The New Jersey Highlands Act is a policy initiative of massive scope and utopian ambition. Water conservation and preservation of open space are to a substantial extent pretexts or euphemisms for what is in fact an anti-development measure. The net effect of the entire legislative scheme, when fully implemented, will take 859,000 acres, or about 1,342 square miles, and place it off limits to development. A consequence to private landholders is a loss in the value of their property so great as to be tantamount to public confiscation. These are among the conclusions contained in a political scientist's expert report which, together with the extensive record below including the expert reports by a hydrogeologist, real estate appraiser and professional planner, illuminate the Act's constitutional violations.

The issue of whether the New Jersey Highlands Water Protection and Planning Act is a taking of private property by the State without just compensation was raised by the opinions of the Trial Court and the Appellate Division denying Plaintiffs' challenge that the Act was a violation of their constitutional right to equal protection.

Plaintiffs had submitted expert reports and documentation, including a 2003 interoffice memorandum from the Administration of Governor James E. McGreevy, which demonstrated that the true purpose of the Act was to serve as his environmental legacy by implementing the eco-socialist response of environmental lobbyists to the 2002 United States

Forest Service and Department of Agriculture Study of the New York/New Jersey portion of the four-state Highlands Region: freeze all further development in the 859,000-acre area under the guise of water resource protection. As an arbitrary, manipulated and fictional designation without a scientific or rational basis, plaintiffs asserted that the "preservation area" established by the Act violated ordinary economic interests as protected by the equal protection provisions of the New Jersey and United States Constitutions.

On motion for reconsideration, plaintiffs raised the issue of whether the right to farm is a fundamental right entitled to enhanced protections under the due process clause of the Fourteenth Amendment. While a farmer's equity reflects the development potential of the land, it is not synonymous with an interest in developing or selling the land. The average 75% diminution in land value caused by the Highlands Act destroys a farm's equity, which is needed as collateral to borrow against for equipment purchases, capital improvements, working capital, and to buffer lean years. Land value is the primary asset of a farm business. By destroying land equity, the Act makes it impossible to engage in farming as a livelihood.

The Complaint was filed in conjunction with the County of Warren, a political subdivision of the State of New Jersey whose elected Freeholders are, pursuant to their oaths, sworn to uphold the Constitution of the State of New Jersey and the United States. The Complaint alleged constitutional violations under the New Jersey Constitution, since as a political subdivision, the County could not assert federal constitutional claims

against the State. An amended pleading asserting the parallel United States Constitutional violations and a separate count asserting violations under the Civil Rights Law, § 1983, was attached to a motion to amend the pleadings filed on behalf of the nine individual plaintiffs, who are property owners and farmers within the Preservation Area representative of all those whose rights have been violated.

In addition to denying this motion, the Trial Court denied an application to have the pleadings amended to merely add the federal citations, indicating that the New Jersey courts and Constitution were fully capable of protecting plaintiffs' rights under the United States Constitution. To the contrary, the trial and appellate decisions establish that the New Jersey Highlands Act is a $15 billion dollar uncompensated taking unprotected by the Constitution of the State of New Jersey.

The Appellate opinion analyzed plaintiffs' proofs and argument pursuant to takings principles as applied by New Jersey Courts and concluded that the Plaintiffs could avail themselves of the Act's waiver/takings application mechanism or receive compensation pursuant to the Highlands Transfer of Development Rights (TDR) program. The takings/waiver mechanism is an economic futility and practical impossibility. The only statutory mechanism to compensate property owners for the taking of 75% of their property value in the 415,000-acre preservation area is a TDR program, which six years after the Act's effective date remains chimerical, has not generated a single transaction, and can never function on the necessary scale to address the takings since it requires voluntary participation by municipalities.

In its holding, the Appellate Division goes beyond violating the Constitutional protection from State takings of private property without just compensation to violation of the fundamental right to own private property which it protects. The Court held:

> "Plaintiffs argue that Count Four of their Complaint was erroneously dismissed because the Highlands Act's establishment of the Highlands Region with a core preservation zone is 'a legal fiction without scientific basis.' They assert that the Highlands land area is distinguishable from the hydrogeologic conditions in the Pinelands, where those conditions warranted regulating the land by establishing a preservation area. For present purposes, we will assume that they are correct. However, they ignore the legislative findings contained in N.J.S.A. 13:20-2 that expressed the legislature's concerns to protect other exceptional natural resources such as clean air, contiguous forest, lands, wetlands, pristine watersheds and habitat for fauna and flora," as well as "many sites of historic significance."

In other words, the State's interest in preserving open space is in itself sufficient to justify exercise of police powers through regulations which prevent use of private property.

In order to understand how the Act violates the fundamental right to own private property, analysis begins with English Common Law and the concept of

livery of seisin. No real right to land could be transferred without livery of seisin, a ceremony with witnesses generally standing on the land itself. Accompanying the words "Know ye that I have given," the feoffee was then handed an object representing the land such as dirt, turf or twigs. Over a period of hundreds of years, the delivery of a deed came to replace delivery of twigs, but the concept of physical possession and ownership of land remained.

At the time of the American Revolution, the English Common Law of real property was fully established, but with a caveat: we were a free people with liberty to own private property without any obligation to the English Crown. Our Constitution protects that right by forbidding the State from taking property for a public purpose without payment of just compensation.

Under current property law theory, instead of twigs symbolizing possession and ownership, property ownership is likened to a bundle of sticks. Each stick represents a different property right. As long as the government reasonably exercises its police powers in the form of environmental regulations and doesn't take too many sticks away, there is no violation of the right to own private property with constitutional protections from takings by the State.

Arguments for environmental regulations imposing preservation standards are premised on the public interest that preservation of land in its natural state is a universal, absolute and paramount State interest. An individual may own private property, but the State's interest in preserving it justifies leaving the owner with

one stick: the right to use the land as open space for the benefit of the public. This consequence mirrors the Marxist based eco-socialism concept of common grounds replacing private property. It is based on a usufructary property law system rooted in Roman Civil Law which is alien to our Common Law concept of private property. The New Jersey Court's decision validates the variant of eco-socialism embodied by the Highlands Act.

Plaintiffs' Petition for Certification to the New Jersey Supreme Court was denied on January 12, 2010 and filed January 14, 2010.

REASONS FOR GRANTING THE PETITION

The State of New Jersey enacted the *New Jersey Highlands Water Protection and Planning Act* (*N.J.S.A.*13:20-1 *et seq.*) The Act prohibits development within 410,000 acres area mapped by the State Department of Environmental Protection. The Highlands Act itself concludes that it will result in the "taking of private property" and therefore provides a "compensation" mechanism for harmed property owners known as the "Transfer of Developments Rights Program". (*N.J.S.A.* 13:20-13) However, the Transfer of Developments Rights Program is an impossibility based on its voluntary nature and the massive scope of the takings which will not compensate the landowners for the taking of *seventy-five* percent of their property value. The Highlands Act authorized the DEP to develop regulations to implement a waiver process. (*N.J.S.A.* 13:20-33(b). The DEP promulgated Takings Waiver Application process *N.J.A.C.* 7:38-6.8, which plaintiffs are required by the New Jersey Supreme Court to

exhaust before asserting a takings claim, is an economic futility leaving no remedy to challenge the taking by the State of New Jersey.

Additionally, this case raises an extraordinarily important and difficult issue. Should farming be recognized as a fundamental right and therefore subject to strict scrutiny or intermediate scrutiny protection under the Fifth Amendment Due Process Clause? The right to farm is a right that does not have its origin in the United States Constitution but in the Holy Bible. Farming can be traced back to the Bible's Book of Genesis as a gift given to mankind for our subsistence. In addition, farming is a natural right that is deeply rooted in our great Nation's history and regulation of farming should require a heightened level of scrutiny.

I. THE COURT SHOULD DECIDE WHETHER REGULATION OF FARMING SHOULD BE SUBJECT TO A HIGHER STANDARD OF SCRUTINY

The right to farm is a right which is deeply rooted in the Nation's History, that neither liberty nor justice would exist if said right were sacrificed. In fact, the right to farm is a natural right, which has it's roots in the *Book of Genesis* and God.

The Supreme Court has historically found constitutional protection to apply to those liabilities "implicit in the concept of ordered liberty [such that] neither liberty nor justice would exist if [they] were sacrificed." *Moore v. City of East Cleveland*, 431 U.S.494, 503(1977). The Due Process Clause guarantees more

than fair process. *Washington v. Glucksberg*, 521 U.S. 702, 719, 117 S. Ct. 2258, 2267, 138 L.Ed. 2d 772(1997) (citing *Collins v. Harke-Heights*, 503 U.S. 115, 125 S. Ct. 1061, 1068-1069, 177 L. Ed. 2d 261 (1992)). "The clause also provides heightened protection against governmental interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 at 719, 117 S. Ct. 2258, 226). The Supreme Court has held that there are additional rights which are implicit in the Due Process Clause. Those rights, which the court has labeled as fundamental include:

> "the rights to marry, *Loving v. Virginia*, 388 U.S.535, 87 S. Ct. 1817, 18 L. Ed. 2d 1010(1967); to have children, *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 62 S. Ct. 1817, 86 L. Ed. 2d 1665(1942); to direct the education and upbringing of one's children, *Meyer v. Nebraska*, 262 U.S. 390, 43 S. Ct. 625, 67 L. Ed. 2d 1042(1923); *Price v. Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L.Ed. 2d 1070 (1925); to marital privacy, *Griswald v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510(1965); to use contraception, *ibid*; *Eisenstadt v. Baird*, 405 U.S. 438, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972); to bodily integrity, *Rochin v. California*, 342 U.S. 165, 72 S. Ct.205, 96 L.Ed.2d 183(1952); and to abortion, *Casey, supra.*"

Washington v. Glucksberg, 521 U.S. 702, 721, 117 S.Ct. 2258, 2267.

The Supreme Court has established a "method of substantive-due-process analysis [which] has two primary features: rights and liberties which are objectively, 'deeply rooted in the Nation's history and tradition', and 'implicit in the concept of ordered liberty', such that 'neither liberty nor justice would exist if they were sacrificed.'" *Id.* at 721,722, 117 S. Ct., at 2268. The *Fourteenth Amendment* forbids the government from infringing upon fundamental liberty interests, unless the infringement is narrowly tailored to serve a compelling State interest. *See, e.g., Reno v. Flores*, 507 U.S. 292, 302, 113 S. Ct. 1439, 1447, 123 L. Ed. 2d 1(1993).

Legislation reflecting the existence of the right to farm is now in effect in all 50 states. Forty-six of these were in place as of 1983 and were developed in response to the increased demand for agricultural products and the substantial changes in population patterns in the 1970's. Comment: Right to Farm Laws: Breaking New Ground in te Preservation of Farmland, 45 U. Pitt. Law Rev. (1984). While the legal mechanisms to protect the right to farm focused on exemption from nuisance liability caused by various aspects of agricultural production, proponents of the legislation made clear that the right to farm was a fundamental right. In New Jersey, the Right to Farm Act was one of several related pieces of legislation which were developed by the New Jersey Secretary of Agriculture and agricultural organizations. The legislative history submitted by plaintiffs for judicial review of this issue included initial drafts of the New Jersey Right to Farm Act, which explicitly interpreted the Constitution to provide New Jersey citizens with an "inherent right" to farm the land.

In addition to State legislation, many municipalities adopted similar ordinances recognizing the right to

farm. Several of the fourteen Warren County Municipalities whose ordinances were submitted for review made specific findings to justify the legislative enactment:

> "The Mayor and Township Committee being aware and having studied the character, history and economic, sociological history of the Township and upon the finding that the historical economic backbone of the Township of Franklin has been that of a farming and agricultural community and in furtherance of protecting the agricultural rights that have existed for hundreds of years . . ."

> "The Township Council finds that farming has existed and has been carried on in the Township for hundreds of years and long before the residential development that has since been prevalent in the Township. . . . the Township Council finds and determines that farmers must be secure in their ability to earn a livelihood and utilize customary farming procedures and techniques."

> "Recognition of Right. The Township of Blairstown recognizes the industry of farming is a natural right and that this industry has been the main source of income and occupation since the founding of our Republican State."

Review of the roots of the right to farm demonstrate that it is a natural right and is among unalienable rights the Declaration of Independence holds has been

endowed by the Creator. The Divine origin of this right is apparent in the Book of Genesis from the stories of Adam' fall from the Garden of Eden, the judgment and punishment of Cain, and the covenant with Noah after the Great Flood.:

> "And the Lord God planted a garden eastward in Eden; and there he put the man whom he had formed." Genesis 2:8 "And out of the ground made the Lord God to grow every tree that is pleasant to the sight, and good for food;" *Id.*, 2:9 "And thc Lord God took the man and put him into the Garden of Eden to dress it and to keep it." *Id.*, 2:15 "And unto Adam he said, because thou hast hearkened unto the voice of thy wife, and has eaten of the tree, of which I commanded thee saying "thou shalt not eat of it": cursed is the ground for thy sake; in sorrow shalt thou eat of it all days of thy life;" *Id.*, 3:17 "Thorns also and thistles shall it bring forth to thee; and thou shalt eat the herb of the field;" *Id.*, 3:18 "Therefore the Lord God sent him forth from the Garden of Eden to till the ground from once he was taken." *Id.*, 3:23.
>
> "And Abel was a keeper of sheep, but Cain was a tiller of the ground." *Id.*, 4:2 "And he said, what hath thou done? The voice of thy brother's blood crieth unto me from the ground." *Id.*, 4:10 "And now art thou cursed from the earth, which had opened her mouth to receive thy brother's blood from thy hand;" *Id.*, 4:11 "When thou tillest the ground it shall

> not henceforth yield unto thee her strength; a fugitive and a vagabond shall thou be on the earth." *Id.*, 4:12.
>
> "And God spake unto Noah saying, Go forth of the ark, thou and thy wife and thy sons and thy sons' wives with thee. Bring forth with thee every living thing that is with thee of all flesh, both of fowl and of cattle, and of every creeping thing that creepeth upon the earth;" *Id.*, 6:18 "And the Lord smelled a sweet savour; and the Lord said in his heart, I will not again curse the ground anymore for man's sake; for the imagination of man's heart is evil from his youth; neither will I again smite anymore every living thing as I have done. While the earth remaineth, seedtime and harvest, and cold and heat, and summer and winter, and day and night shall not cease." *Id.*, 8:21-8:22 "And Noah began to be an husbandman and he planted a vineyard." *Id.*, 9:20.

From these Biblical roots, the right of man to bring forth the fruits of the earth sustained him throughout history. The lowly potato saved Western Europe's remaining population from the Black Death. By the 18th Century, English farmers had settled New England villages. Dutch, German, Swedish, Scotch Irish and English farmers had settled on isolated Middle Colony farmsteads. English and some French farmers had settled on plantations in tidewaters and on isolated Southern Colony farmsteads in Piedmont. The largely agrarian society of the Founding Fathers would not have

existed but for the right to farm. By 1790, 90 percent of the workforce in the United States were farmers. Economic Research Service. (2000, September). *A History of American Agriculture*, 1607-2000. (ERS-POST-12.) Washington, DC: Author, *http: www.agclassroom.org/gan/timeline/farmers.land.htm*

Natural rights are recognized by secular theorists as well. Ayn Rand observed:

> "Whether one believes that man is the product of the Creator or nature, the issue of man's origin does not allow for the fact that he is an entity of a specific kind – a rational being – that he cannot function essentially under coercion, and that rights are a necessary condition of his particular mode of survival." *Rand, Ayn*, "Man's Rights", *Capitalism: The Unknown Ideal*, Penguin Group (USA) Inc., copyright 1946, 1962, 1964, 1965, 1966.

A right-to-farm is such a condition.

In a highly distinguishable case, the Eighth Circuit Court of Appeals considered whether the right to farm marijuana was pursuant to a "tribal ordinance" was a fundamental right. *United States v. Plume*, 447 F.3d 1067(8th Cir. 2006). In that case the Eighth Circuit refused to recognize "farming hemp" as a fundamental right in part because the "[United States] Supreme Court has not declared 'farming' to be a fundamental right." *Id.*, at 1075. Petitioners agree with the Eighth Circuit in that regard, such a decision regarding the right to farm should be considered by the United States Supreme Court.

II. THE SUPREME COURT SHOULD DECIDE WHETHER THE STATE OF NEW JERSEY'S EXERCISE OF ITS POLICE POWERS THROUGH THE ENACTMENT OF ENVIRONMENTAL LEGISLATION IS A TAKING OF PRIVATE PROPERTY WITHOUT PAYMENT OF FAIR AND JUST COMPENSATION PURSUANT TO THE FIFTH AMENDMENT

Specifically at issue is whether the Highlands Act's overlapping development standards, regulatory structure and fictional core, which are intended to prevent development within a 410,000 acre legislatively defined "preservation area" (and ultimately in the entire 1,342 square mile legislatively defined Highlands Region), is a legitimate state purpose for exercise of its police powers in light of its devastating consequences. While preservation of undeveloped land in its natural state can be a public purpose for exercise of the State's rights to obtain property pursuant to its power of eminent domain with payment of fair market value, standing alone it is not a legitimate basis for exercise of the State's police power.

The Supreme Court in *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594(1962) quoting *Lawton v. Steel*, 152 U.S. 133, 136(1894) described the implied necessity of the police power as follows:

> "To justify the State in . . . interposing its authority on behalf of the people, it must appear, first, that the interests of the public. . .requires such interference; and second, that

> the means are reasonably necessary for the accomplishment of the purpose and not unduly oppressive upon individuals.

It is also long acknowledged that exercise of police power may result in a diminution of value:

> "Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under implied limitation and must yield to the police power." *Pennsylvania Coal Company v. Maylan*, 260 U.S. 393, 415 (1922).

In *Agins v. City of Tiberon*, 447 U.S. 255(1980), the United States Supreme Court established a takings test in the context of a municipal zoning ordinance implementing a state land use legislative delegation of power which enabled the municipality to restrict the development of open space. It is the standard which should be applied to the Highlands Act, which has had its intended affect of preventing any further development of open space in a 410,000 acre legislatively defined "preservation area".

Under the *Agins* test, a court must find either that the law affects the taking "(1) if the Ordinance does not substantially advance a legitimate State interest, or (2) denies an owner economically viable use of his land." 447 U.S. at 261.

The Court should further review this issue since the Highlands Act is an example which may be utilized in the other 49 States to implement eco-socialist property rights principles. The extensive record below demonstrate the adverse societal impacts of the Act and provide the basis for the Court's determination of this issue, critical not only to New Jersey residents impacted by it, but by all citizens who may become subject to preservation statutes and regulations adopted by other States exercising their police powers.

Preservation regulations such as the Highlands Act identify as many environmental resources as possible and subjectively rank their value. Through the re-definition of accepted terms, development standards with arbitrary buffers, prohibition of permits for water supply and sewer service, and an approval process which is an economic futility, preservation regulations cumulatively make development of property a practical impossibility. An example is to include intermittent streams in a definition of open waters so that the Act's 300' buffers apply to intermittent streams.

The Highlands Act's development standards are contained in *N.J.S.A.* 13:20-32. These were subsequently readopted by the NJDEP with an additional standard which the DEP was directed to promulgate:

> "A septic system density standard established at a level to prevent the degradation of water quality, or to require the restoration of water quality, and to protect ecological uses from individual, secondary, and cumulative impacts, in consideration of deep aquifer recharge available for dilution."

The effect of this regulation is to extend the Act's impact beyond the average 75% devaluation by limiting densities to one residential dwelling per 25 acres and 88 acres throughout the preservation zone. This regulation was challenged by the New Jersey Farm Bureau, *In Re Highlands Water Protection and Planning Act Rules, N.J.A.C.* 7:38-1 *et seq.*, Docket No. A-984-05T1. Oral argument had been scheduled but has been extended at the request of the New Jersey Attorney General while the administration of Governor Christopher Christie evaluates the regulation.

The other component of a preservation statute is to impose an extremely expensive and cumbersome administrative approval process in order for a property owner to use their property for something other than legislatively bargained exemptions such as those contained in *N.J.S.A.* 13:20-28. The process under the Highlands Act is a Highlands Preservation Area Approval (HPAA), *N.J.S.A.* 13:20-33. In addition to the extraordinary expenses associated with the process apparent from a facial review of the statutory requirements, an HPAA will only be considered if it does not propose any more than the minimal beneficial use of the land. This minimal beneficial use is further impacted by the requirement that an application comply with all of the developmental standards.

In order for a property owner to pursue a takings claim, the New Jersey Supreme Court has held the administrative hardship waiver remedy of the Highlands Water Protection and Planning Act, *N.J.S.A.* 13:20-33 must be exhausted before a property owner can assert a claim that the Act's restrictions upon development in

the preservation area of the Highlands Region has resulted in a regulatory taking. *OFP, LLC v. State*, 395 N.J. Super. 571(App.Div.2007), 930 A. 2d 442, Judgment aff'd by 197 N.J. 412, 963 A. 2d 810(2009). Plaintiffs were so directed by the Appellate Decision.

Based on the economic futility of the HPAA process and the additional administrative regulations governing the DEP's case by case exercise of discretion to grant waiver of standards to prevent takings, there is no remedy for a takings claim by the State of New Jersey in the State of New Jersey. Pursuant to *N.J.A.C.* 7:38-6.8(g), the DEP will only consider a request for a waiver to avoid a taking of property without just compensation pursuant to *N.J.S.A.*13:20-33(b)after it has rendered a decision on the HPAA. Plaintiffs are also required to demonstrate attempts to sell the development rights through the TDR program and prove that there were no reasonable offers to purchase the property based on the minimal, economically viable use from the project after requesting an offer from a DEP list of environmental organizations.

As is apparent from its governing statute, *N.J.S.A.* 13:20-13, the Highlands T.D.R. Program is illusory and will never be a meaningful source of compensation on the scale of the State's Highlands takings. The failure of the Highlands Council to include areas designated as voluntary receiving zones with a model TDR in place when it adopted a Regional Master Plan is the subject of a pending Appellate challenge. *In Re Adoption of Highlands Regional Master Plan*, Docket No. A-1054-08.

Since the Appellate Division concluded that "shall" means "may" in the context of the failure of an executive agency to exercise a delegated legislative land use power within 18 months, there is no possibility that the complex TDR Program will ever be implemented.

The portions of the Highlands Act annexed as Appendix G, *N.J.S.A. 13:20-13* (TDR Program) Pet. App. 48a – 54a, *N.J.S.A.* 13:20-28 (Exemptions) Pet. App. 55a – 61a, *N.J.S.A.* 13:20-32 (Standards) Pet. App. 61a- 65a and *N.J.S.A.* 13:20-33 (Highlands Permitting) Pet. App. 66a - 69a and the DEP Waiver/Takings process (*N.J.A.C.* 7:38-6.8) Pet. App. 66a -77a provide a blueprint for other States to prevent development of open space as a police power without payment of any compensation. Supreme Court review is required.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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